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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1532

FRANCIS M. COCKE, Petitioner,

IRWIN S. CANTOR, et al., Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Ralph E. Hunsaker, Esq.
O'CONNOR, CAVANAGH, ANDERSON,
WESTOVER, KILLINGSWORTH & BESHEARS
1800 First Federal Savings Building
3003 North Central Avenue
Phoenix, Arizona 85012

Attorneys for Respondents

POWELL B. GILLENWATER
and
LORETTA S. WHITNEY

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O'CONNOR, CAVANAGH, ANDERSON,
WESTOVER, KILLINGSWORTH & BESHEARS
1000 First Federal Savings Building
3003 North Central Avenue
Phoenix, Arizona 85012

Attorneys for Respondents

POWELL B. GILLENWATER
and
LORETTA S. WHITNEY

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1532

FRANCIS M. COCKE, Petitioner,

v.

IRWIN S. CANTOR, EINO M. JACOBSON, FRANCIS J. CONOFRIO, WALLACE O. TANNER, HUBERT KELLY, STEVEN H. SCHNEIDER, LORETTA S. WHITNEY, POWELL B. GILLENWATER, TRANSAMERICA TITLE INSURANCE COMPANY, TITLE INSURANCE COMPANY OF MINNESOTA, JAMES STEWART COMPANY and M. SETH HORNE and MAURINE D. HORNE, his wife, JOAN H. COCKE, and ARLEIGH H. BURTON, Respondents.

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO THE
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FOR THE NINTH CIRCUIT

OPINION AND JUDGMENTS BELOW

These Defendants agree with the Petitioner's summary of the opinion and judgments below.

JURISDICTION

These Defendants agree with the Petitioner's assertion of jurisdiction in this court.

QUESTIONS PRESENTED

The Petitioner claims that the question relevant to these Defendants is whether the Civil Rights Act permits a federal court to review state court judgments entered in violation of the Petitioner's right to due process of the law, because the state court lacks subject matter jurisdiction over the actions in which those judgments were entered. (Petition, p. 14). That question

is moot in this case. The district court held it had jurisdiction and dismissed the complaint for failure to state a claim upon which relief could be granted, finding that the state court did have subject matter jurisdiction, so the judgments were not entered in violation of the Petitioner's constitutional rights. The question is, therefore, whether the district court erred in so holding.

STATEMENT OF THE CASE

The Petitioner, his ex-wife, and a trustee, holders of varying interests in a certain piece of land, agreed to sell that land in 1968. After a series of events, including a dispute between the Petitioner and his ex-wife over payment instructions and refusal of the Petitioner to execute certain documents, the buyers brought suit for specific performance of the sales

agreement. James Stewart Co. v. Cocke, Civil No. C-222. 472 (Maricopa Cty., Ariz. Super. Ct., filed April 22, 1969). In a series of judgments, the trial court dismissed the Petitioner's Counter- and Crossclaims against his wife and other parties in the specific performance action. James Stewart Co. v. Cocke, supra, (Nov. 10, 1970), aff'd sub nom. Cocke v. Transamerica Title Ins. Co., 16 Ariz. App. 556, 494 P. 2d 746 (1972). Finally, it entered judgment against the Petitioner on the complaint for specific performance and ordered the sale consummated. The Arizona Court of Appeals dismissed the Petitioner's appeal from this judgment, saying, "It is the opinion of this Court that the appeal is frivolous." James Stewart Co. v. Cocke, No. 1-CA-CIV-2306 (Ariz. App. May 17, 1973). The Petitioner did not appeal this dismissal to the Arizona

Supreme Court.

The Petitioner then brought this suit under the Civil Rights Act in the federal district court, naming as defendants practically every party, attorney and judge who had anything to do with the case in state court. This brief is filed on behalf of Ms. Whitney and Mr. Gillenwater, who served as attorneys for the Plaintiff's ex-wife and the escrow agent, respectively. The only allegation in the Petitioner's complaint pertaining to these two defendants was as follows:

> "Under pretense and color of state law and authority, such other parties to the agreement, their attorneys-at-law, and the three judges by joint and several action with discriminatory intent and purpose have subjected

> or caused to be subjected the Petitioner Cocke to the deprivation of equal rights, privileges and immunities . . . including deprivation of his right to l[illegible]e access to the courts." (Petitioner's Appendix, p. 4).

The federal district court dismissed the Petitioner's suit for failure to state a claim upon which relief could be granted, in essence, holding that since the state courts had jurisdiction over the person and property, the Civil Rights Act cannot be used as a guise to religate substantive questions of law.

The Ninth Circuit Court of Appeals granted the Defendants' Motion to Affirm. Cocke v. Cantor, et al., No. 74-1997 (Oct. 7, 1974). This Petition for Certiorari followed.

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ARGUMENT NO. 1

The federal district court was correct in finding that the state court had subject matter jurisdiction in the original litigation.

When a federal court receives a complaint alleging a massive conspiracy including attorneys and judges to misuse the judicial process by forcing a judgment on someone without having jurisdiction over the action, we agree that the federal court has jurisdiction to determine whether the complaint states a cause of action under the Civil Rights Act. In this case the Petitioner alleged that the judgments violated his right to due process of law because the court had no jurisdiction over the subject matter of his case. The lower district court held that the state court did have subject matter jurisdiction over

the lawsuit, so the actions of the Defendants, their attorneys, and the judges did not result in a denial of the Petitioner's civil rights. Hence, the federal court said, the Petitioner's complaint did not state a claim upon which relief could be granted. (Petitioner's Appendix, p. 161).

The question of jurisdiction can best be answered by a cursory examination of the first page of the original 43-page Answer and Counterclaim filed by the Petitioner in the Superior Court of Maricopa County in June of 1969. The first page of the Answer and Counterclaim clearly shows that the Petitioner himself invoked the jurisdiction of the Superior Court in June of 1969. No citations are needed to advise this Court that the filing of the Answer and Counterclaim by Francis M. Cocke clearly gave

the Superior Court jurisdiction over the person of Francis M. Cocke. Likewise, the legal description of the real property attached to the complaint shows that the property involved in the state court litigation is located in Maricopa County, Arizona. The Superior Court of the State of Arizona clearly had jurisdiction over the real property located in Maricopa County, which was the sole subject matter of Mr. Cocke's protracted litigation. It is respectfully submitted that the state court, having jurisdiction over both the person and property of the Plaintiff, had jurisdiction to enter the three judgments which Plaintiff now seeks to relitigate under the Civil Rights Act. The Petitioner has been given numerous opportunities to question the jurisdiction of the trial court and the other Arizona courts. Notably, in Cocke v. Transamerica Title Ins. Co.,

16 Ariz. App. 556, 494 P. 2d 756 (1972), the court dealt at length with each of the jurisdictional arguments of the Petitioner, which are sought to be relitigated in this Court. In that case, the court stated:

> "This Court is initially faced with a 'jurisdictional' attack raised by appellant. At the time of oral argument, appellant contended that this appeal should be dismissed because the trial court lacked jurisdiction to enter the judgment appealed from. Because this issue had not previously been raised in this case before this Court, appellant was granted leave to file a supplemental memorandum on this issue and appellee was granted time to

file a response thereto. Appellant has filed a twenty-three, legal-size page, memorandum in this Court which, distilled to its bare bones, contends the trial court lacked jurisdiction in this matter for the following reasons:

(1) Because Transamerica's counterclaim for attorney's fees was based upon only one provision of the escrow instructions--granting the escrow agent attorney's fees--'it is elemental that a party to a contract cannot come into court seeking the enforcement of only its claimed rights under selected provisions of the contract,

without regard to its obligations under the other provisions also incorporated into its pleadings, since such relief is beyond the power or jurisdiction of the court to grant.'

(2) Transamerica did not join the other party to the escrow instructions in its counterclaim for attorneys' fees and such other party was 'indispensable'.

(3) Since Transamerica's counterclaim did not join the minor beneficiaries of a trust formed by Mr. and Mrs. Cocke, the trial court

was without jurisdiction to proceed.

Turning to the last 'jurisdictional' argument first, as we have previously pointed out in a footnote, our decision in Cocke v. Cocke, supra, held that the interest of Mrs. Cocke in the real property involved in this sale was not subject to any trust. To argue at this late date that the beneficiaries of that trust still have an interest in the disposition of this real property and therefore are indispensable parties, not only taxes the patience of this Court, but calls into serious question the advocacy of appellant's counsel.

[2] The appellant's first 'jurisdictional' ground is also without merit. There is no contention that the trial court did not obtain personal jurisdiction over appellant and appellee and that they were not properly before the Court. There is likewise no contention that the trial court lacked subject matter jurisdiction to determine whether Transamerica was guilty of negligence or breach of fiduciary duty in administering the escrow agreement. If we understand appellant's argument correctly, it is that if a person is a party to a

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contract, one provision of which allows a prevailing party attorney's fees in any litigation arising out of that contract, the party to that contract may not sue under that provision alone because to do so in some manner fails to consider all the other provisions of the contract and thus would abrogate those other provisions which the court has no jurisdiction to do. To state the proposition is to show its preposterousness. Admittedly, the trial court might err in determining that a party is entitled to attorney's fees, but 'error' and 'jurisdiction' are two wholly separate and distinct

concepts, and jurisdiction is not involved in the foregoing situation.

[3] Appellant's next argument that the buyers under the escrow instructions were 'indispensable parties' to Transamerica's counterclaim against appellant is also without merit. Transamerica's claim for attorney's fees arose out of and only out of defending appellant's alleged claim against it. It was appellant and only appellant who caused Transamerica to incur the attorney's fees claimed. In such circumstances neither the buyer nor any other party to the escrow agreement would even be proper parties to Trans-

> america's claim for attorney's fees, let alone indispensable parties.
>
> For the foregoing reasons we hold the trial court had jurisdiction to determine the issues placed before it."
>
> 494 P. 2d at 758.

The Petitioner not only has had his day in court, but has had numerous days in court. He has been afforded an opportunity to amend his Counterclaim to state a claim in the Superior Court; to engage in extensive discovery prior to Defendants' Motions for Summary Judgment; respond in writing to the Motion for Summary Judgment and be heard on oral argument prior to the entry of judgment; to object in writing and orally to the form of judgment; to appeal to the Arizona Court of Appeals the granting of the Summary Judgment and to file a

written brief therein and orally argue his defenses; and to be heard on a special action filed in the Arizona Supreme Court to state his own appeal based on the alleged jurisdictional defects. Upon remand of the case to the Superior Court, he was afforded an opportunity to reargue and rehash the same jurisdictional arguments previously made before the trial court, the Court of Appeals, and the Supreme Court; was thereafter afforded an opportunity to object, orally and in writing, to the form of modified judgment directed by the Arizona Court of Appeals; and was thereafter afforded an opportunity to file an appeal from the modified judgment, which appeal the Court of Appeals found to be frivolous. The Petitioner was further afforded an opportunity to seek review by the Arizona Supreme Court, but did not do so. Mr. Cocke raised his jurisdictional argument on at least six

of the above-mentioned occasions, and at each juncture, the appropriate court found that there was jurisdiction over both the person and the property of the Plaintiff.

ARGUMENT NO. 2

The Petitioner's suit against Whitney and Gillenwater, Attorneys, is frivolous and without merit.

The thrust of the Petitioner's argument at the district court level is that the Defendants, in concert, acted to deprive the Petitioner of his constitutional rights to due process of law. Specifically, as it concerns the Respondents Gillenwater and Whitney, the Petitioner fails to state in his complaint any facts upon which a cause of action could be based against these individuals. He simply mentions them as being attorneys for Transamerica and Joan H. Cocke, who

represented their respective clients as to matters not only dealing with the original real estate transaction, but with the subsequent and protracted state court litigations. A cursory review of the record demonstrates that the Petitioner simply attempts to relitigate the issues already tried in state court and to deluge the Court with so many broad facts and conclusory allegations that these Respondents would be caught on the "coattails" of the general allegations of conspiracy and violation of constitutional rights.

That the assertion of the violation of these rights and conspiracy cannot be used as a guise to relitigate substantive issues already adjudicated at the state court level has clearly been held in various cases. See, e.g., Morgan v. Sylvester, 125 F. Supp. 380, aff'd., 220 F.2d 758 (2nd Cir. 1955),

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and French v. Corrigan, 432 F. 2d 1211 (7th Cir. 1970). Cf., P.I. Enterprises, Inc. v. Cutaldo, 457 F. 2d 1012 (1st Cir. 1972); Francisco Enterprises, Inc. v. Kirby, 482 F. 2d 481 (9th Cir. 1973).

More specifically, it is well settled that to state a cause of action of any kind against a private attorney who has acted as a representative on behalf of his client, the plaintiff must allege facts which establish one of the recognized grounds for lawyer liability. To establish personal liability, he must allege facts showing that either the attorney personally pledged his own responsibility or failed to disclose his agency, all with respect to his representation of his client, Thornberry v. Board of Education, 8 Ill. App. 351, 290 N.E. 2d 360 (1972), or allege facts which demonstrate that the attorney acted outside his scope of agency and

authority as a representative to the point of committing fraud, conspiracy, or likewise, Pickard v. Maritime Holding Corp., 161 So. 239 (Fla. 1964); Haldane v. Friedman, 22 Cal. Rptr. 445 (Div. 1, Cal. 1962); and other cases collected in Annot., 45 A.L.R. 3d 1181 (relating to liability to third parties). In the case at bar, as noted above, the Petitioner's complaint is patently devoid of allegation that the Defendants Gillenwater and Whitney acted beyond the scope of their authority and roles as attorneys for their clients.

Additionally, there is a whole line of federal court decisions holding that activities of private practitioners conducted solely in their capacity as a representative and counsel for a client are not such that it can be deemed bases for a cause of action under the Civil Rights Act, and in fact

the private practitioner enjoys an immunity from suit. For example, in Kennedy v. Fox, 232 F. 2d 288 (6th Cir. 1956), the court held that a private practitioner who prepared certain papers filed as a first step in proceedings resulting in a person's confinement to a mental institution was not amendable to an action based on the Civil Rights Act. Similarly, in several cases, it has been held that court-appointed attorneys representing a defendant in a criminal proceeding are immune from suit based on the Civil Rights Act, because none of their acts could be considered to be performed under the color of law. French v. Corrigan, 432 F. 2d 1211 (7th Cir. 1970); Brown v. Joseph, 463 F. 2d 1046 (3rd Cir. 1972). The same rationale has been used to cloak a court-appointed attorney with immunity for his acts in representing a trustee in bankruptcy. Smallwood v. United

States, 358 F. Supp. 398 (E.D. Mo. 1973). If a court-appointed attorney is held to be immune from suit under the Civil Rights Act for any activities arising out of his representation of a client, even more so a private practitioner who is not court appointed should be cloaked with immunity from suit arising out of the Civil Rights Statute.

CONCLUSION

The Respondents Gillenwater and Whitney respectfully submit that the Petitioner presents to questions which are substantial and require the submission of their brief, oral arguments, and the written opinion of this Court; therefore, the Petition for Certiorari should be summarily dismissed.

Respectfully submitted,

O'CONNOR, CAVANAGH, ANDERSON,
WESTOVER, KILLINGSWORTH & BESHEARS

By Ralph Hunsaker

Ralph Hunsaker
1800 First Federal Savings Bldg.
3003 North Central Avenue
Phoenix, Arizona 85012

Attorneys for Respondents
POWELL B. GILLENWATER and
LORETTA S. WHITNEY

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of July, 1975, three copies of the Brief in Opposition to Petition for a Writ of Certiorari were mailed, postage prepaid, to the following attorneys. I further certify that all parties required to be served have been served.

Wallace O. Tanner, in propria persona
Attorney for respondents Arleigh H. Burton, Title Insurance Company of Minnesota, James Stewart Company and M. Seth Horne and Maurine D. Horne, his wife
3800 North Central Avenue
Phoenix, Arizona 85012

Hubert E. Kelly, in propria persona
Attorney for respondents Steven H. Schneider, Title Insurance Company of Minnesota, James Stewart Company and M. Seth Horne and Maurine D. Horne, his wife
550 West Washington Street
Phoenix, Arizona 85003

John R. Sticht
Attorney for respondents
Irwin S. Cantor, Eino M. Jacobson, and Francis J. Donofrio
309 State Capitol Building
Phoenix, Arizona 85007

Powell B. Gillenwater
Browder & Gillenwater, P.C.
Attorneys for respondent Transamerica
2304 First Federal Savings Building
3003 North Central Avenue
Phoenix, Arizona 85012

Loretta S. Whitney
Attorney for respondent Joan H. Cocke
603 Luhrs Building
Phoenix, Arizona 85003

Richard Anthony Johnson
Counsel for Petitioner
132 South Central Avenue, Suite 7
Phoenix, Arizona 85004

Ralph E. Hunsaker

RALPH E. HUNSAKER
O'Connor, Cavanagh, Anderson,
Westover, Killingsworth & Beshears
Attorneys for respondents Powell B.
Gillenwater and Loretta S. Whitney
First Federal Savings Building, Suite 1800
Phoenix, Arizona 85012

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